2009

# Amber Klein v. Marysvale Town : Brief of Appellant

Utah Court of Appeals

**IN THE UTAH COURT OF APPEALS**

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| AMBER KLEIN,<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>MARYSVALE TOWN,<br><br>Defendant and Appellee. | Appellate Case No. 20090490 |

# APPELLANT'S OPENING BRIEF

On Appeal from the Sixth Judicial District Court of Piute County, Junction Department

Case No. 070600008, Judge Paul D. Lyman


David L. Church
BLAISDELL & CHURCH
5995 South Redwood Road
Salt Lake City, Utah 84123
*Attorney for Defendant/Apellee*
*Marysvale Town*

Timothy W. Blackburn
Richard H. Reeve
Van Cott, Bagley, Cornwall & McCarthy
372 24th Street, Suite 400
Ogden, Utah 84401
*Attorneys for Plaintiff/Appellant*


**ORAL ARGUMENT REQUESTED**

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BLAISDELL & CHURCH
5995 South Redwood Road
Salt Lake City, Utah 84123
*Attorney for Defendant/Apellee Marysvale Town*

Timothy W. Blackburn
Richard H. Reeve
Van Cott, Bagley, Cornwall & McCarthy
372 24th Street, Suite 400
Ogden, Utah 84401
*Attorneys for Plaintiff/Appellant*


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## PARTIES IN THE COURT BELOW

The caption lists all parties to the proceedings below.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES



### RULES

## STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this matter pursuant to *Utah Code Annotated* § 78A-4-103.

## ISSUES PRESENTED FOR REVIEW

(i) Did the District Court err in finding that there were no disputed issues of material fact regarding whether the "side trail" where the accident occurred was a road open to the public for off-road recreational use?

(ii) Did the District Court err in finding that both the *Off-Highway Vehicle Registration Act* and the *Limitation of Landowner Liability Act* applied to immunize Defendant from liability for Plaintiff's injuries?

**Determinative Law:**

*Utah Code Annotated*, § 41-22-10.1(3).

*Utah Code Annotated*, § 57-14-3.

*Utah Code Annotated*, § 57-14-1.

*Utah Rules of Civil Procedure,* Rule 56(c).

Schaerrer v. Stewart's Plaza Pharm., Inc., 79 P.3d 922 (2003)

Surety Underwriters v. E & C Trucking, Inc., 10 P.3d 338 (2000).

**Standard of Review:**

Factual disputes are to be viewed in the light most favorable to the non-moving party. Surety Underwriters v. E & C Trucking, Inc., 10 P.3d 338, 341 (2000). When reviewing a ruling on summary judgment, the Appellate Court should give no deference

to the lower court's legal conclusions and should review the issues presented under a correctness standard. Schaerrer v. Stewart's Plaza Pharm., Inc., 79 P.3d 922, 928 (2003).

**Demonstration that Issues Were Preserved in the District Court**:

In the hearing on Defendant's Motion for Summary Judgment before Judge Lyman, counsel for Plaintiff argued that summary judgment was inappropriate and premature because there existed disputed issues of material fact. [Tr. 10, 11, 12, 27, 29, 31] [1]. During this same hearing, counsel for Defendant also acknowledged that there was "some dispute as to whether or not the property she was riding on was a trail or just the side of the road." [Tr. 6].

Counsel for Plaintiff also argued that the *Off-Highway Vehicle Registration Act, Utah Code Annotated* § 41-22-1 *et seq.*, and the *Utah Limitation of Landowner Liability Act, Utah Code Annotated* § 57-14-1 *et seq.*, did not apply to the injury at issue in this matter because the "side trail" where the accident occurred was not open to the public for off-road and/or recreational use. [Tr. 10, 11, 12, 27, 29, 31].

## DETERMINATIVE PROVISIONS

**Utah Code Annotated, Section 41-22-10.1:**

> **Vehicles operated on posted public land.**
> (1) Currently registered off-highway vehicles may be operated on public land, trails, streets, or highways that are posted by sign or designated by map or description as open to off-highway vehicle use by the controlling federal, state, county, or municipal agency.
> (2) The controlling federal, state, county, or municipal agency may:
> (a) provide a map or description showing or describing land, trails, streets, or

[1] References to the trial court record appear as [R.__]. References to the transcript of Summary Judgment Motions from the February 25, 2009, hearing before Judge Lyman appear as [Tr.__].

highways open to off-highway vehicle use; or

(b) post signs designating lands, trails, streets, or highways open to off-highway vehicle use.

(3) Liability may not be imposed on any federal, state, county, or municipality relating to the designation or maintenance of any land, trail, street, or highway open for off-highway vehicle use.

**Utah Code Annotated, Section 57-14-1:**

**Legislative purpose.**
The purpose of this act is to encourage public and private owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering the land and water areas for those purposes.

**Utah Code Annotated, Section 57-14-3:**

**Owner owes no duty of care or duty to give warning—Exceptions.**
Except as provided in Subsections 57-14-6(1) and (2), an owner of land owes no duty of care to keep the premises safe for entry or use by any person entering or using the premises for any recreational purpose or to give any warning of a dangerous condition, use, structure, or activity on those premises to that person.

**Utah Rules of Civil Procedure, Rule 56(c):**

**Motion and proceedings thereon.** The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## STATEMENT OF THE CASE

This matter involves an ATV accident that took place on or about August 7, 2006. [R. 1-5, 29-33, 67-81]. Appellant was riding a Polaris ATV along a portion of the Piute ATV trail that runs through, and around, Marysvale, Utah. [R. 1-5, 29-33, 67-81, 108-

113], [Tr. 6]. As Appellant and her family rode their ATVs down the trail, they drove onto a well-worn side trail just off the main Paiute ATV trail. [R. 1-5, 29-33, 67-81], [Tr. 6, 10]. Appellant was several feet ahead of her family when she ran into a barbed wire fence which had been erected across the side trail. [R. 1-5, 29-33, 67-81], [Tr. 6, 10-11]. Appellant was wearing a helmet; however, one of the strands of the barbed wire fence struck the exposed, unprotected portion of her neck below the helmet, causing severe lacerations to Appellant's neck, which required approximately 75 stitches. [R. 1-5, 29-33, 67-81]. The side trail where the accident occurred is on property that is owned and controlled by the Town of Marysvale. [R. 1-5, 29-33, 67-81, 108-113], [Tr. 6]. Plaintiff alleges that the barbed wire across the side trail was placed in such a way that it was not visible to a member of the public using the trail. [R. 1-5, 29-33, 67-81]. The barbed wire severely injured the Appellant's neck. [R. 1-5, 29-33, 67-81], [Tr. 10-11].

Plaintiff commenced this action by filing a Complaint in the Sixth Judicial District Court of Paiute County on or about August 2, 2007. [R. 1-5]. This action was initially assigned to Judge Mower in the Sixth Judicial District. [R. 1-5]. Plaintiff subsequently amended her Complaint on or about February 11, 2008. [R. 29-33]. On or about June 30, 2008, and after a short period of formal discovery, Defendant filed a Motion for Summary Judgment arguing that the *Off-Highway Vehicle Act* and the *Limitation of Landowner Liability Act* insulated Defendant from liability for Plaintiff's injury. [R. 40-41, 42-66]. Plaintiff filed an opposition on July 28, 2008, and the case was submitted for decision on August 17, 2008. [R. 67-81, 107]. The motion was heard on February 25, 2009, by Judge Lyman, a juvenile court judge in the Sixth Judicial

District Court for Paiute County. [R. 107 ]. Judge Lyman determined that there were no disputed material issues of fact, and that both the *Off-Highway Vehicle Registration Act* and the *Limitation of Landowner Liability Act* applied to immunize Defendant from liability for Plaintiff's injuries. [R. 108-113, 114-115]. Judge Lyman's Memorandum Decision was entered on or about March 3, 2009, and his Order of Summary Judgment was entered on or about May 20, 2009. [R. 108-113, 114-115].

Plaintiff filed an appeal from Judge Lyman's Order of Summary Judgment on June 3, 2009. [R. 116-117].

## STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED ON APPEAL

1. On or about August 7, 2006, Plaintiff (Amber Klein) was riding an ATV on the portion of the Piute ATV trail system that is located within the boundaries of Marysvale Town. [R. 1-5, 29-33, 67-81, 108-113], [Tr. 6].

2. As Plaintiff rode her ATV down the Piute ATV trail, she detoured off the trail onto a well-worn side trail that went around a cattle guard that was installed on the trail. [R. 1-5, 29-33, 67-81], [Tr. 6, 10].

3. The side trail that Plaintiff used was not part of the Piute ATV trail, was not intended for ATV use, and was in place for cattle and horse use only. [R. 25-26, 67-81, 108-113], [Tr. 31].

4. The side trail that Plaintiff used was well-worn and appeared to have been well-traveled by ATVs or other motor vehicles. [R. 67-81], [Tr. 14-15].

5. The barbed wire fence that Plaintiff crashed into, as she traveled down the side

trail, appeared to be new; was very difficult to see; and was not marked with any signs or other visible markings. [R. 1-5, 29-33, 67-81], [Tr. 10].

6. The Mayor of Marysvale testified that the side trail where the accident occurred was owned by Marysvale, but was not part of the Paiute ATV trail, and was not open to the public for ATV or recreational uses, but was for livestock. [R. 25-26, 67-81, 108-113], [Tr. 31].

## SUMMARY OF ARGUMENT

This appeal primarily asks the Court to determine whether Judge Lyman correctly held that there were no disputed issues of material fact that precluded him from ruling on Defendant's Motion for Summary Judgment. Plaintiff's contention is that the issue of whether the "side trail" where the accident occurred was open for off-highway recreational use is a material fact that was clearly disputed by the parties below. The record clearly demonstrates this factual dispute, as does the Memorandum Decision issued by Judge Lyman. At the very least, there were disputed facts sufficient to create a reasonable inference of dispute in favor of Plaintiff, the non-moving party.

The fact of whether the side trail was open for off-highway recreational use is material because the *Off-Highway Vehicle Registration Act* and the *Limitation of Landowner Liability Act* only provide liability immunity if the property is "opened" to the public for off-highway vehicle or recreational uses.

This appeal also asks the Court to determine whether Judge Lyman correctly applied the *Off-Highway Vehicle Registration Act* and the *Limitation of Landowner Liability Act* to immunize Defendant from liability for Plaintiff's injuries. Plaintiff's

contention is that neither act applies because Gary James, Mayor of Marysvale Town, in his deposition, testified that the "side trail" where the accident occurred was not open to the public for off-highway ATV use, but was used solely for cattle and livestock uses.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WERE CLEAR MATERIAL FACTUAL ISSUES IN DISPUTE.

Summary judgment is only appropriate when the documentation on file and available to the Court shows that there is no disputed issue of material fact, such that the moving party is entitled to judgment as a matter of law. Surety Underwriters v. E & C Trucking, 10 P.3d 338, 341 (Utah 2000). In the context of a Motion for Summary Judgment, the Court is to view the facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Id. at 341. Therefore, if the facts and the reasonable inferences drawn from the facts show that there is a disputable issue of material fact, summary judgment is a premature and inappropriate remedy.

Judge Lyman erred in granting summary judgment in this matter because there were clearly issues of disputed material fact contained in the record and raised by the parties. First, there was a factual dispute about whether the accident occurred on the Marysvale Town road system and/or Piute ATV trail system, or on a side-trail that is separate and apart from the Marysvale Town road system and/or Piute ATV trail system. Second, there was a dispute about whether the side trail was "opened" to the public for recreation purposes. As outlined below, these factual allegations were material to the resolution of this matter because the two statutes that Defendant relied upon in its motion

apply only to roads or trails that have been opened to the public for recreational use or opened as an ATV trail. See *Utah Code Ann.* § 57-14-1 *et seq.*; § 41-22-1 *et seq.*

As demonstrated below, Judge Lyman, at the very least, erred by failing to draw "reasonable inferences" from the facts in favor of Plaintiff, the non-moving party. At the very least, this is grounds for a reversal of the Order of Summary Judgment.

### A. Disputed Material Fact for the Applicability of the Off-Road Highway Vehicle Registration Act: Was the Side Trail "Open" for Off-Highway Vehicle Use

The *Off-Highway Vehicle Registration Act*, contained in *Utah Code Ann.* § 41-22-1 *et seq.*, extends liability immunity to municipalities who open their property to off-highway ATV use. Section 41-22-10.1(3) of the *Off-Highway Vehicle Registration Act* provides that:

> Liability may not be imposed on any federal, state, county, or municipality relating to the designation or maintenance of any land, trail, street, highway *open* for off-highway vehicle use.

*Utah Code Ann.* § 41-22-10.1(3) (emphasis added).

As stated in this statutory provision, governmental bodies are exempted from liability for accidents that occur on off-highway roads or trails if the trail has been "opened" for off-highway vehicle use. The necessary corollary of this statutory provision is that governmental bodies *are* liable to off-highway vehicle users who are injured on off-highway roads or trails that have not been "opened" for off-highway use. It is clear that the legislature would not need to statutorily remove a governmental body's liability and duties of care if such liabilities or duties did not exist in the first place.

The reasoning behind the language that the legislature used in this statutory provision, and the implications that naturally flow from this statutory language, is obvious—the legislature was interested in protecting those who operate off-highway motor vehicles.[2] See *Utah Code Ann.* § 41-22-1 (noting that the purpose of the *Off-Highway Vehicles Act* is to "promote safety and protection for persons . . . connected with the use, operation, and equipment of off-highway vehicles.") The legislature clearly acknowledged the risk presented to off-highway vehicle users, and established the *Off-Highway Vehicle Registration Act* to protect, in part, users and operators of off-highway vehicles. It is also clear that the legislature acknowledged the fact that governmental bodies and actors have a common law tort duty to protect business invitees or known frequent trespassers[3] that operate off-highway vehicles on trails, roads, and streets that are located on governmental land. Governmental bodies and actors have the option of exempting themselves from tort liability associated with property owners by designating and opening public roads, streets, and trails to off-highway vehicle use.

In this case there was a dispute about whether the side trail where the accident occurred was part of the Paiute ATV trail, and whether the side trail was open to off-highway recreational use. Defendants argued that the side trail was not a side trail, but

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[2] Off-highway motor vehicles are defined, pursuant to Utah Code Ann. § 41-22-2, to include the type of all terrain vehicle that Plaintiff was operating and riding during the accident that is the subject of this matter.

[3] Utah law clearly recognizes that property owners have a duty to protect trespassers from dangerous conditions on their property when they have real or constructive knowledge that trespassers frequently intrude upon the property. See generally Connor v. Union Pacific Railroad Co., 972 P.2d 414 (Utah 1998).

was actually part of the main Paiute ATV Trail, and open to off-highway recreational use [R. 42-66], [Tr. 14]. Plaintiff argued that the side trail was not part of the Paiute ATV trail, and was not open to off-highway recreational use. [R. 1-5, 29-33, 67-81], [Tr. 10, 11, 12, 27, 29, 31]. Plaintiffs, in support of their position, pointed to the deposition of Gary James, Mayor of Marysvale Town; wherein Mayor James testified that the side trail where the accident occurred was not open or intended to be used for off-highway vehicles. [Tr. 31].

It appears from Judge Lyman's Memorandum Decision, that he recognized this factual dispute because Judge Lyman noted that "[t]he side trails where the accident occurred was *[sic.]* for cattle and horse access." [R. 108-113]. It is not altogether clear, from Judge Lyman's decision, how he reconciles this factual dispute with his decision to grant summary judgment. It may be that Judge Lyman considered the dispute about where the accident occurred, and whether the accident site was open to for off-highway recreational use, to be immaterial. If this is the case, Judge Lyman erred. The single most material fact in determining whether the *Off-Highway Vehicle Registration Act* is applicable is whether the accident site—the "side trail"—was open for off-highway recreational use. This fact is material because it triggers the immunity offered by the Act.

Judge Lyman also tried to avoid the material question of whether the "side trail" was open to the public for off-highway recreational use by entertaining conjecture about where the Paiute ATV trail began and ended. This conjecture among Judge Lyman and counsel took up a large portion of the oral argument on Defendant's Motion for Summary Judgment. [Tr. 18-31]. This conjecture also appears in Judge Lyman's Memorandum

Decision, where he determines that the expansive definition of "street" in the *Off-Highway Vehicle Act* extends the "open" nature of the Paiute ATV Trail to the side trail where the accident occurred. [R. 108-113].

Judge Lyman's conjecture, and ultimate reliance on the Act's definition of "street," is unnecessary. In this matter, there is no question that the side trail where the accident occurred was not open for off-highway recreational use because Gary James, the Mayor of the Town of Marysvale, testified that the side trail was open only for cattle and horse use. [R. 67-81, 108-113], [Tr. 31]. According to the *Off-Highway Vehicle Registration Act* the determination of whether a piece of property is "open" is not to be determined by the interpretation of statute or by a Court—it is to be determined by the municipality or owner who owns the relevant property. Mayor James' pronouncement that the side trail was for cattle and horses is determinative: the side trail was not "open" and thus, the liability immunity provided by the *Off-Highway Vehicle Registration Act* is inapplicable to this matter. Judge Lyman erred in ignoring this material fact and granting summary judgment.

### B. Disputed Material Fact for the Applicability of the Limitation of Landowner Liability Act: Was the Side Trail "Open" for Recreational Use?

The *Limitation of Landowner Liability Act*, contained in *Utah Code Ann.* § 57-14-1 *et seq.*, extends liability immunity to property owners, public and private, who open their property to the public for recreational use. The purpose of said Act is to provide a means by which public and private owners can limit their common law owner's tort liability by "opening" their land to the public for "recreational purposes." See *Utah Code*

*Ann.* § 57-14-1. A public or private landowner can "open" their land to the public for recreational purposes by "mak[ing] land and water available to the public" without charge or for a nominal fee. See *Utah Code Ann.* § 57-14-1, 57-14-4. The necessary corollary of this statutory provision is that property owners *are* liable to recreational users who are injured on recreational property that has not been "opened" for recreational use. It is clear that the legislature would not need to statutorily remove a property owner's liability and duties of care if such liabilities or duties did not exist in the first place.

The legislature created this statutory provision to protect landowners who open their property up, without charge, to recreational users. See *Utah Code Ann.* § 57-14-1. The legislature also intended for the Act to provide a means for the public and private landowners to exempt themselves from common law tort liability in connection with users or invitees of their property.

Again, as noted above, there was a dispute below about whether the side trail where the accident occurred had been opened for recreational use. This fact is material to the applicability of the *Limitation of Landowner Liability Act*--if the property is not opened for recreational use, the property owner is subject to common law tort liabilities applicable to real property.

In this case, it is alleged that the "well worn" and "well traveled" side trail where the accident occurred, was not open or intended to be used for recreational purposes. [R. 1-5, 29-33, 67, 81], [Tr. 31]. As a result, Marysvale Town is not, under the *Limitation of Landowner Liability Act*, exempt from liability for Plaintiff's accident, and had a duty to protect Plaintiff from the dangerous condition that the barbed wire fence created on its

property. Judge Lyman erred in ignoring this material fact and granting summary judgment.

## II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE OFF-HIGHWAY VEHICLE ACT AND THE LIMITATION OF LANDOWNER LIABILITY ACT IMMUNIZED MARYSVALE TOWN FROM LIABILITY FOR PLAINTIFF'S INJURIES

As discussed above, Judge Lyman clearly erred in determining that the *Off-Highway Vehicle Act* and the *Limitation of Landowner Liability Act* immunized Defendant from liability for Plaintiff's Injuries. These acts are only applicable if the side trail where the accident occurred was open for off-highway vehicle use or recreational use. Mayor James testified, in his deposition, that the side trail was for cattle and livestock use only. Judge Lyman erred in ignoring this material fact, and his determination to apply the *Off-Highway Vehicle Registration Act* and the *Limitation of Landowner Liability Act* was in error.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court overturn the District Court's decision granting Defendant's Motion for Summary Judgment and remand this matter to the District Court for additional proceedings.

DATED this 21st day of December, 2009.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

Timothy W. Blackburn
Richard H. Reeve
*Attorneys for Plaintiff/Appellant, Amber Klein*

## ADDENDUM INDEX

**Exhibit A.** Memorandum Decision

**Exhibit B.** Order Of Summary Judgment

## CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December, 2009, I caused two (2) copies of the foregoing Brief of Appellant to be mailed in the United States mail, first class, postage prepaid, to the following:

David L. Church
BLAISDELL & CHURCH
5995 South Redwood Road
Salt Lake City, Utah 84123
*Attorney for Defendant/Appellee, Marysvale Town*

Adela Irvin